Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Innovation and Competition in the	)	MB Docket No. 14-261
Provision of Multichannel Video Programming	)	
Distribution Services	)	

COMMENTS OF THE ABC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, FBC TELEVISION AFFILIATES ASSOCIATION, AND NBC TELEVISION AFFILIATES

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Summary

The ABC, CBS, FOX, and NBC Affiliates Associations (collectively, the "Affiliates Associations") endorse the Commission's proposal to modernize the interpretation of the term "multichannel video programming distributor" ("MVPD") to include services that distribute video programming via the Internet and, in particular, the retransmission of broadcast station signals via the Internet. That interpretation is consistent with the unambiguous, open-ended, and technology-neutral definition of MVPD: "[A] person such as, *but not limited to*, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming" (emphasis added). That online video distributors are not listed among the statutory *examples* of MVPDs is insignificant, as the 1992 Cable Act, which added the statutory definition, preceded the widespread availability of broadband Internet access by many years.

The broad, flexible statutory definition also cannot be limited by the technology-specific definition of "channel" and "cable channel" that appears elsewhere in the statute. The term "channel" in Section 602(13) of the Act should be interpreted in an everyday, non-technical sense to mean a stream or network of video programming. A contrary conclusion would render Sections 602(13) and 602(4) hopelessly irreconcilable and the statutory definition of MVPD largely meaningless, as the *non-cable* entities expressly identified as MVPDs by statute (such as DBS and MMDS) are incapable of delivering "channels" of programming via "a portion of the electromagnetic frequency spectrum which is used in a cable system." 47 U.S.C. § 522(4).

Likewise, the statutory definition cannot be read to require that an entity provide a transmission path for the delivery of programming to be classified as an MVPD. Nothing in the

plain language of Section 602(13) imposes a transmission path requirement or conditions MVPD status upon the methodology a service uses to deliver video programming to its customers, and no requirement *implicit* in the technical definition of "channel" and "cable channel" should be read as a limitation upon the facially-broad, technology-neutral definition of MVPD. Indeed, the *Notice* correctly observes that the entities expressly enumerated in Section 602(13) as examples of MVPDs do *not* all provide a transmission path. Nor can the single reference to "facilities-based" competition in the legislative history of the 1992 Cable Act justify the imposition of a transmission path requirement. The Commission long ago recognized that an entity need not provide a "facilities-based" service in order to serve as a source of competition to traditional MVPDs[1] and need not "operate the vehicle for distribution" of programming to qualify as an MVPD because "the plain language of Section 602(13) imposes no such requirement."[2]

At bottom, video programming distributors that use the Internet are similar to traditional MVPDs in the most important way: They deliver linear streams of video programming to subscribers. For that reason, the expansive statutory definition, which says nothing about the *means* by which programming reaches a subscriber, must be read to encompass them. The Affiliates Associations, therefore, agree with the Commission's proposed Linear Programming Interpretation and respectfully urge its broad application to OVDs that distribute more than one stream of broadcast station programming at a prescheduled time to subscribers, but not to transaction-based or on-demand services. (The Commission should make clear, however, that *no* third party may carry *any* broadcast station's signal without its consent.) The Linear

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[1] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 5631, 5651-52 (1993), at ¶ 23.

[2] *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301 (1996), at ¶ 171.

Programming Interpretation should apply without regard to a broadcast-streaming OVD's election, because a rule allowing broadcast-streaming OVDs to decline MVPD status would invite circumvention of the retransmission consent and other regulatory requirements and would be administratively impractical to monitor and enforce in any event.

The Linear Programming Interpretation not only is consistent with the open-ended, technology-neutral definition of MVPD but also is compelled by core national communications policies. Treating broadcast-streaming OVDs as MVPDs would enhance competition, the diversity of sources of video programming, and the development of new technologies, all to the benefit of consumers; it is also essential to the meaningful application of the statutory retransmission consent requirement. The legislative history of the 1992 Cable Act makes clear that "*anyone engaged in retransmission by whatever means*" must obtain the consent of the station whose signal is retransmitted.[3] An interpretation of "MVPD" that would invite broadcast-streaming OVDs to circumvent the retransmission consent regime would directly and substantially impair the economic viability of broadcast stations and undercut the Nation's local broadcast communications policy.

Indeed, core principles of localism should guide the Commission's application of the retransmission consent regime to broadcast-streaming OVDs, along with the Commission's program exclusivity enforcement scheme and the good faith negotiation requirement. Existing good faith negotiation rules applicable to traditional MVPDs seeking retransmission consent simply cannot be applied strictly or without appropriate modification to the entire universe of online distributors. Instead, the Affiliates Associations propose that OVDs should be required to satisfy certain *threshold* requirements before a broadcast station's duty to negotiate in good faith

[3] S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) (emphasis added).

is triggered: (1) The broadcast-streaming OVD must register with the Commission; (2) it must provide prior written notice of its intent to commence service; (3) it must propose to retransmit the broadcast station's signal within its *local* market; (4) it must be authorized to do business in the state in which it intends to retransmit a broadcast station's signal; (5) it must be able to demonstrate that it has the means to authenticate its subscribers to ensure that only authorized individuals will, in fact, receive the signal; (6) it must demonstrate that it has the ability to geo-fence the station's broadcast signal so that individuals located outside the geographical area to which the broadcaster consents to retransmission cannot receive the signal; (7) it must demonstrate that it will prevent unauthorized copying and distribution of the signal; and (8) it must ensure that the signal will be transmitted in its entirety (including closed captioning, video description, etc.) and that the quality of the signal will not be materially degraded.

Just as application of the retransmission consent requirement to broadcast-streaming OVDs is essential to the protection and preservation of broadcast localism, program exclusivity rules also must be applied to OVDs. The Commission should amend its network non-duplication and syndicated exclusivity rules to apply to OVDs that retransmit television broadcast signals. Program exclusivity protection is indispensable to the ability of local broadcast stations to produce and distribute high-quality, locally-oriented programming, because on-air advertising revenues are the principal funding source for stations' investments in local programming, and advertisers expect exclusivity to ensure that their ads reach local audiences. Broadcast-streaming OVDs cannot be allowed to avoid the program exclusivity rules; a contrary result would threaten core principles of broadcast localism.

That position is unaffected by the fact that the Section 111 cable compulsory copyright license does not apply to OVDs. The Commission's historical rationale for adopting program

exclusivity protections for broadcast stations predated the existence of a statutory copyright license.[4] Moreover, the position taken by the Copyright Office that the cable statutory copyright license does not apply to OVDs should not affect the Commission's communications law policy determination in this proceeding. A Commission decision to classify OVDs as MVPDs would neither conflict with copyright law nor alter it. Absent congressional action, OVDs simply will be required to negotiate for private copyright licenses (as well as retransmission consent) to retransmit broadcast signals over the Internet unless the courts or Congress should determine that the existing cable compulsory copyright license applies to OVDs.

Finally, the Affiliates Associations agree with the Commission that cable systems that use IP technology to retransmit linear streams of broadcast station signals should continue to be subject to cable regulations. A critical consideration, however, is that incumbent MVPDs cannot be allowed or invited to avoid regulation—and, in particular, the retransmission consent requirement—by migrating their traditional MVPD services to the Internet. Because the Commission's proposed Linear Programming Interpretation would render OVDs equally subject to the retransmission consent requirement, that interpretation would eliminate the (retransmission-consent-related) incentive for traditional providers to avoid traditional regulatory requirements by migrating their services to Internet-based platforms.

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[4] *See In the Matter of Amendment of Subpart I, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, Second Report and Order, 2 F.C.C. 2d 725, 736 (1966), at ¶ 25.

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The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (collectively, the "Affiliates Associations")[1] submit these comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") in the above-referenced docket, in which the Commission proposes to modernize the interpretation of the term "multichannel video programming distributor" ("MVPD") to include services that distribute video programming via the Internet, i.e., "online video distributors" ("OVDs").[2]

The *Notice* is the latest development in the Commission's years-long consideration of this issue, first raised by a 2010 program access complaint filed by Internet-based programming

[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are each affiliated with its respective broadcast television network.

[2] *See In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, FCC 14-210 (Dec. 19, 2014) ("*Notice*").

distributor Sky Angel U.S., L.L.C. against Discovery Communications, L.L.C.[3] In response to Sky Angel's complaint, the Media Bureau in 2012 issued a public notice seeking comment on the interpretation of "MVPD" and "channel" to determine whether OVDs such as Sky Angel should be classified as MVPDs—and, therefore, subject to various regulatory benefits and obligations of MVPDs.[4]

The Affiliates Associations filed comments in response to the Media Bureau's 2012 *Sky Angel* notice, urging a straightforward, technology-neutral interpretation of the unambiguous statutory definition "MVPD" to encompass entities that distribute linear streams of video programming to subscribers via the Internet as well as via cable, microwave, and satellite. The Associations pointed out that a failure by the Commission to subject OVDs to the retransmission consent requirement of Section 325(b) of the Communications Act of 1934 would create an asymmetrical and competitively unfair regulatory scheme and would undermine and jeopardize the important public policy interests underlying the congressionally-mandated retransmission consent requirement.[5]

In the years since the *Sky Angel* proceeding began, the distribution of video programming

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[3] *See Notice* at ¶ 10.

[4] *See Media Bureau Seeks Comment on Interpretation of the Terms "Multichannel Video Programming Distributor" and "Channel" As Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Public Notice, 27 FCC Rcd 3079 (MB 2012). The Media Bureau held the Sky Angel proceeding in abeyance in December 2014 in order to allow the Commission to seek broad public input on the important issues raised by the current *Notice*. *See Notice* at ¶ 12.

[5] *See* Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates, MB Docket No. 12-83 (filed May 14, 2012) ("2012 Affiliates Associations Comments"); Letter from John R. Feore, Jr., Counsel for Fox Affiliates Association, to Marlene H. Dortch, Secretary, Federal Communications Commission (June 13, 2012).

via the Internet has, as the Commission acknowledged, progressed at a remarkable pace. The Affiliates Associations applaud the deployment of new platforms that provide additional outlets for the distribution of television programming. In light of the constant technological development that characterizes the marketplace and the rapid evolution in the ways broadcast content reaches consumers, however, it is more imperative than ever that the regulatory requirements governing the retransmission of broadcast station signals be applied equitably without regard to the technological *methodology* employed. The regulatory regime not only should promote and encourage competition and diversity in the delivery of video programming,[6] it must also ensure that broadcast licensees retain the ability to control the retransmission and resale of their broadcast signals to assure viewer access to the *local* news, public safety, weather, public affairs, and other public interest programming that only *local* broadcast stations provide. In today's highly-competitive video distribution market, both advertising *and* retransmission consent revenues are essential to the ability of broadcast stations to create and provide "local" programming. The legal rules governing retransmission of local television stations' signals, therefore, must foreclose the potential circumvention of the congressionally-mandated retransmission consent requirement by new technologies.

Evenhanded regulation of online distributors of broadcast television signals will enhance consumer welfare through fair competition in the delivery of video programming and protect local broadcasters' ability to create and distribute the local news, sports, weather, emergency, and public interest programming that lies at the heart of the Commission's localism mandate. These essential policy considerations must inform the Commission's interpretation of the term

[6] The *Notice* emphasizes that a technology-neutral definition of MVPD will encourage competition, to the ultimate benefit of consumers. *See Notice* at ¶¶ 3-5.

"MVPD" and its application of regulatory rights and responsibilities of MVPD status to new marketplace entrants.

I. Online Providers of Linear Streams of Video Programming Should Be Classified As MVPDs

A. The Broad, Technology-Neutral Definition of MVPD Readily Encompasses Online Video Distributors

The Affiliates Associations endorse the Commission's proposal to "modernize" the interpretation of MVPD to "include[e] within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming."[7] This interpretation is consistent with the flexible, technology-neutral, and open-ended statutory and regulatory definitions of "multichannel video programming distributor"; it is correct as a matter of communications policy; and it is critical to the statutory retransmission consent requirement and the important localism interests it promotes, which lie at the heart of the Nation's congressionally-mandated broadcast regulatory policy.

Section 602(13) of the Communications Act of 1934 broadly defines an MVPD as

> a person ***such as, but not limited to***, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.

47 U.S.C. § 522(13) (emphasis added). The Commission's rules define the term similarly, if not more broadly, as:

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[7] *Notice* at ¶ 1; *see also id.* at ¶ 13 (proposing "to interpret the term MVPD to mean all entities that make available for purchase, by subscribers or customers, multiple streams of video programming distributed at a prescheduled time"); *id*. at ¶¶ 16-24.

> an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities ***include, but are not limited to***, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.

47 C.F.R. § 76.1000(e), § 76.1300(d) (emphasis added).[8] Both definitions are deliberately flexible and untethered to any particular means or technology by which video programming is transmitted to consumers.[9] And both definitions, by their plain terms, encompass entities that use the Internet (rather than cable, satellite, telco, or microwave) to distribute linear streams of video programming.

The fact that Internet-based programming distributors are not listed among the examples of MVPDs is irrelevant; the list was intended to be illustrative rather than limiting. And it is not surprising that online or Internet-based video programming distributors do not appear in the lists, as the enactment of the statutory definition of MVPD[10] preceded widely available broadband Internet access by many years. Technological developments in the years since the 1992 Cable

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[8] *See also* 47 C.F.R. § 76.64(d); 47 C.F.R. § 76.71(a).

[9] The Commission repeatedly has recognized as much. *See, e.g.*, *Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20301 (1996), at ¶ 171 ("[T]he list of entities enumerated in [Section 602(13)] is expressly a non-exhaustive list."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive . . . ."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065 (1992), at ¶ 42 (observing that the statutory definition of "MVPD" is "broad in its coverage").

[10] *See* Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Pub. L. No. 102-385, § 2, 106 Stat. 1460 (1992) (adding Section 602(13) to the Communications Act).

Act have facilitated new methods for delivering video programming streams to consumers that were hardly imaginable in 1992. Those technological changes call for application of the statutory term—which Congress defined in a deliberately open-ended fashion not tied to any particular technology—to certain entities that deliver linear streams of video programming to subscribers via the Internet.[11]

B. The Statutory Term "Channel" Does Not Mandate the Provision of a "Transmission Path" or Otherwise Exclude OVDs from Classification As MVPDs

For the reasons explained at length in the Affiliates Associations' 2012 comments (which are incorporated into and made a part of these comments), the Affiliates Associations agree with the Commission's tentative conclusion that the definition of MVPD cannot be read to incorporate the cable-specific definition of "channel" and "cable channel" in Section 602(4) of the Act.[12] The Affiliates Associations also agree that that cable-specific definition cannot be cited as a basis for imposing a "transmission path" requirement as a prerequisite to MVPD status. An interpretation of the term "MVPD" that derives a transmission path requirement that appears nowhere in Section 602(13) from something *implicit* in a *separate* statutory provision would ignore the actual, operative language of the statute, as well as the plain, unequivocal intent of Congress.

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[11] Because the broad and flexible statutory definition plainly encompasses over-the-top providers of multiple streams of video programming, the Affiliates Associations see no need to propose or consider alternate definitions of the term.

[12] *See* 2012 Affiliates Associations Comments at 6-10.

1. The Cable-Specific Definition of "Channel" Cannot Be Invoked to Limit the Commission's Interpretation of the Term "MVPD"

The Affiliates Associations agree with the Commission that the cable-specific definition of "channel" that appears elsewhere in the Act cannot be used to limit an interpretation of the term "MVPD."[13] Section 602(4) defines a channel as "a portion of the electromagnetic frequency spectrum *which is used in a cable system* and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)."[14] That definition is patently specific and limited to *cable systems*, a fact entirely in keeping with its enactment as part of the 1984 Cable Act, which was directed solely to the regulation of cable television. The Section 602(13) definition of MVPD, by contrast, was added in the 1992 Cable Act and plainly includes *non-cable* entities among the enumerated examples of entities that meet the statutory definition—and, most importantly, does not incorporate or even make reference to the cable-specific definition of "channel" in Section 602(4). If Section 602(4)'s definition of "channel" were read as a limitation on the definition of "MVPD," then the non-cable entities that Congress explicitly defined as MVPDs (such as DBS and MMDS) *could not* be MVPDs, because they are incapable of delivering multiple "channels" of video programming via "a portion of the electromagnetic frequency spectrum which is used in a cable system." As the Affiliates Associations explained in 2012, and as the *Notice* recognizes,[15] such an interpretation

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[13] *See Notice* at ¶ 22.

[14] 47 U.S.C. § 522(4) (emphasis added).

[15] *See* 2012 Affiliates Associations Comments at 6-10; *Notice* at ¶ 21 (acknowledging that the term "MVPD" "is explicitly defined to encompass video programming distributors that include, but are not limited to, cable operators"); *id.* at ¶ 22 (positing that "using the cable-
(continued . . .)

would produce absurd, hopelessly irreconcilable, and "illogical and unworkable result[s]" and must be rejected.[16] The general rule of statutory construction that identical terms in a single statute should be interpreted identically does not compel a contrary conclusion.

As the Affiliates Associations pointed out in 2012,[17] an "*identical*" definition of "channel" would render much of Section 602(13) entirely superfluous, contrary to long-settled principles of statutory interpretation that "each word in a statute should" "carr[y] meaning."[18] In any event, "principles of statutory construction are not so rigid."[19] The *presumption* that a term has the same meaning throughout a single statute "'readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'"[20] In short,

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specific definition of 'channel' to interpret the definition of 'MVPD' [would not be] consistent with the illustrative list of MVPDs that is included in the definition" (footnote omitted)).

[16] *Southwest Software, Inc. v. Harlequin Inc.*, 226 F.3d 1280, 1295 (Fed. Cir. 2000).

[17] *See* 2012 Affiliates Associations Comments at 7-8.

[18] *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70 (2011); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

[19] *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

[20] *Id*. (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (internal citations omitted)). *See also id*. at 575-76 ("[t]here is . . . no 'effectively irrebuttable' presumption that the same defined term in different provisions of the same statute must be interpreted identically . . . . Context counts." (citation omitted)); *Atlantic Cleaners*, 286 U.S. at 433 ("It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the Legislature intended it should have in each instance."); *Barber v. Thomas*, 560 U.S. 474, 484 (2010) (the presumption that a term has the same meaning throughout a statute "is not absolute" but instead "yields readily to indications that the same phrase used in different parts of the same statute means different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion" (citing cases)).

interpretive "presumptions" cannot dictate the Commission's interpretation of the statutory term MVPD when their application would produce a manifestly illogical result.

Instead, the *Notice* correctly concludes that the term "channel," as it is used in the definition of MVPD, should be given its everyday, non-technical meaning: a stream or network of video programming.[21] As the Commission recognizes, that interpretation is "most consistent with consumer expectations, because consumers are focused on the content they receive, rather than the specific method used to deliver it to them."[22]

2. MVPD Status Does Not Require the Provision of a Transmission Path

In the 2012 proceeding, the Media Bureau considered, and various commenters urged, a construction of the statutory term "channel" that includes a transmission path requirement based on dictionary definitions of, and supposed technological limitations implicit in, the term "channel." The Affiliates Associations agree with the current *Notice*'s tentative conclusion, to the contrary, that the statute does not impose a "transmission path" requirement and that only such a non-facilities-based interpretation is consistent with the operative language and structure of the Communications Act, the Commission's own prior rulings, congressional intent, consumer expectations, and industry trends.[23]

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[21] *Notice* at ¶ 17 ("We tentatively conclude that the best reading is that 'channels of video programming' means streams of linear video programming. . . . ."); *id*. at ¶ 24 ("Because the term 'channel' as used in the definition of MVPD is ambiguous, we tentatively conclude that it is reasonable to read the term to have its common, everyday meaning of a stream of prescheduled video programming when we interpret the definition of MVPD.").

[22] *Notice* at ¶ 24.

[23] *See Notice* at ¶ 17 (proposing an interpretation of the term "channel" that would treat video programming networks as "'channels' for purposes of the MVPD definition, regardless of (continued . . .)

As commenters suggested in 2012, and as the *Notice* acknowledges, the term "channel" is ambiguous: It can be used in both a "container" sense and a "content" sense.[24] In some instances, "channel" is indeed defined as a physical transmission path. In others, the term has an "ordinary and common meaning" as an aggregation, stream, or network of video programming.[25] Importantly, consumers of video programming understand and use the term in its everyday, non-technical "content" sense. As the Affiliates Associations argued in 2012, what matters to a subscriber is the *content* being delivered by an MVPD, not the technological means by which it reaches them: Subscribers care about the basic and premium "channels" they receive—such as their local channel 5, or ABC, CBS, FOX, or NBC, or HBO, ESPN, or MTV—not which portion of the electromagnetic frequency spectrum is used to deliver that content to their homes.[26]

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whether the provider also makes available physical transmission paths" (footnote omitted)); *id*. at ¶ 18 (proposing to interpret "the term 'channels of video programming' to mean prescheduled streams of video programming . . . without regard to whether the same entity is also providing the transmission path" (footnote omitted)); *id*. at ¶¶ 22-23. The Affiliates Associations strongly disagree that Congress intended to promote only "facilities-based competition in the video distribution market" as others argued. *See Notice* at ¶ 30. Instead, the expansive definition of MVPD and the congressional purposes underlying it make clear that Congress "sought to encourage competition to incumbent cable operators more generally, *regardless of how the competitive service is delivered*." *Id*. (emphasis added).

[24] *Notice* at ¶¶ 21, 24.

[25] *Notice* at ¶ 21. Both Congress and the Commission frequently have used the term in the latter, more commonplace, less technical sense. *See* 2012 Affiliates Associations Comments at 9-10 & n.16 (citing numerous examples).

[26] See Reply Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, and NBC Television Affiliates, MB Docket No. 12-83 (June 13, 2012) ("2012 Affiliates Associations Reply Comments") at 20 & n.58. The *Notice* observes, to similar effect, that "the legislative history of the 1992 Cable act refers to ESPN as a 'sports channel' and CNN as a 'news channel'; given that both of these are linear programming networks, this suggests that Congress used the term channel, at lease in this instance, to refer to
(continued . . .)

Perhaps most importantly, the statutory definition of "MVPD" is in no way dependent upon the *method* by which an entity delivers video programming to its customers, and nowhere does the statute condition MVPD status upon ownership or control of the transmission path. That forward-looking, technology-neutral, function-based definition allows—indeed, was crafted intentionally to accommodate and adapt to—changes in the technology by which video programming is delivered.[27] It follows from that deliberately open-ended definition that MVPD status should be conferred upon entities that make available to subscribers multiple networks or streams of linear video programming, without regard to whether they also furnish a transmission path along with the programming.

The contrary argument that an MVPD must provide a transmission path because each of the entities listed in the statute do so is based on a factually-flawed premise: As the *Notice* observes, the entities enumerated in Section 602(13) are *not*, in fact, all facilities-based and do not uniformly provide a "transmission path" for the delivery of programming to their subscribers.[28] The Commission has made clear, for instance, that one of the enumerated entities, a "television receive-only satellite program distributor," does not provide a transmission path for

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(. . . continued)
such programming networks and not to portions of the electromagnetic frequency spectrum." *Notice* at ¶ 24 (footnote omitted).

[27] *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73 (1968) ("'[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to those factors.'" (alteration in original) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940))).

[28] *See Notice* at ¶¶ 19-20 & nn.45-47.

the delivery of programming.[29] Other entities long-recognized as MVPDs, although not among those listed in the statute, likewise are not facilities-based. Specifically, open video system programmers ("OVSs") have long been considered MVPDs, notwithstanding the fact that they do not necessarily own or provide a transmission path by which programming is delivered to subscribers.[30] Importantly, the Commission expressly has rejected the indistinguishable argument that OVSs cannot be MVPDs because the entities listed in Section 602(13) "all operate the vehicle for distribution (e.g., cable, MMDS, DBS), whereas open video system video programming providers distribute their product on a common platform in direct competition with other programming providers."[31] Instead, it concluded that the fact that OVSs "may not operate the vehicle for distribution" does not foreclose their status as MVPDs, because "the plain

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[29] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*; Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5651-52 (1993), at ¶ 23 ("TCI asserts that, by including television receive-only satellite programming distributors in the definition of [MVPDs], Congress showed that a distributor need not be facilities-based in order to come within the scope of the effective competition test. *We agree with TCI that a qualifying distributor need not own its own basic transmission and distribution facilities*." (emphasis added)); *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, 7532 (1994), at ¶ 183 ("HSD distributors . . . do not provide a complete distribution path to individual subscribers." (footnote, internal quotation marks, and citation omitted)).

[30] *See, e.g., Implementation of Section 302 of the Telecommunications Act of 1996*, Second Report and Order, 11 FCC Rcd 18223, 18324-25 (1996), at ¶ 196 ("[O]pen video system operators and video programming providers that provide more than one channel of programming on an open video system are MVPDs." (footnote omitted)).

[31] *See Implementation of Section 302 of the Telecommunications Act of 1996*, Third Report and Order and Second Order on Reconsideration, 11 FCC Rcd 20227, 20298, 20301 (1996), at ¶¶ 164, 171.

language of Section 602(13) imposes no such requirement."[32]

The bottom line is this: As the Affiliates Associations pointed out in 2012,[33] the statutory phrase "such as, but not limited to" suggests only that non-enumerated MVPDs must be similar to the entities enumerated in the statute. But programming distributors that utilize the Internet *are* similar to traditional MVPDs in the key way: They deliver streams of linear video programming to subscribers or consumers. The statutory language requires nothing more; it plainly does not condition MVPD status on the *means* by which video programming reaches a subscriber. The Affiliates Associations therefore agree with the Commission's tentative conclusion that "the essential element that binds the illustrative entities listed in the provision is that each makes multiple streams of prescheduled video programming available for purchase, rather than that the entity controls the physical distribution network."[34]

C. The Affiliates Associations Urge Broad Application of the Linear Programming Interpretation

1. OVDs That Provide Linear Streams of Video Programming Should Be Classified As MVPDs

The Affiliates Associations agree with the Commission's tentative view that the broad, technology-neutral term MVPD encompasses subscription-based services that provide "multiple streams of video programming distributed at a prescheduled time"[35]—that is, "linear"

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[32] *Id*. at ¶ 171 (concluding that "open video system video programming providers fit the definition of MVPD because they make 'available for purchase, by subscribers or customers, multiple channels of video programming.'" (footnote omitted)).

[33] *See* 2012 Affiliates Associations Comments at 13-14.

[34] *Notice* at ¶ 19.

[35] *Notice* at ¶¶ 13-14.

programming—via the Internet but should not include transaction-based or on-demand services.[36] Because the statute requires that an MVPD provide "multiple channels of video programming" to subscribers,[37] "subscription on-demand" services such as Netflix and Hulu Plus as well as the transactional on-demand, ad-based on-demand, and "transactional linear" services as described in the *Notice* should be excluded from the definition.[38] As The *Notice* correctly observes, Internet-based distributors of video programming that "do not provide prescheduled programming that is comparable to programming provided by a television broadcast channel . . . fall outside the statutory definition."[39]

The *Notice* relatedly seeks "comment on how to interpret the term 'multiple' in the definition of MVPD"—that is, whether an OVD must offer a minimum number of channels or hours of programming before it will be considered an MVPD.[40] The Affiliates Associations suggest that, at a minimum, any distributor that retransmits more than one "channel" or stream of television broadcast station programming should come within the definition of MVPD. (The Affiliates Associations respectfully urge the Commission to make clear, however, that *no* third

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[36] *Notice* at ¶ 25 & n. 26 (quoting *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 29 FCC Rcd 1597, 1603 (2014), at ¶ 15 n.23 ("A linear channel is one that distributes programming at a scheduled time. Non-linear programming, such as video-on-demand ('VOD') and online video content, is available at a time of the viewer's choosing.").

[37] 47 U.S.C. § 522(13).

[38] *See Notice* at ¶ 25. *See also* Section I.B.1, *supra* (agreeing with the *Notice*'s tentative conclusion that "channel" must be interpreted commonsensically to mean a "stream of linear video programming").

[39] *Notice* at ¶ 14 (footnotes omitted).

[40] *See Notice* at ¶ 25.

party may carry *any* broadcast station's signal without its consent.[41]) The Affiliates Associations further agree with the *Notice*'s suggestion that a retransmission service should qualify as an MVPD if it retransmits via the Internet *more than one television station's signal* that the distributor does not itself own. Thus, a television broadcast station that only distributes its own channels should not be classified as an "MVPD."[42]

With respect to the minimum hours of programming an MVPD must offer, as a practical matter, any "linear" television broadcast station is almost certain to provide full-time programming. A broadcast-streaming OVD's retransmission of every linear programming channel will readily satisfy the definition of MVPD without the need to identify a minimum number of hours of programming that the OVD must retransmit in order to qualify as an MVPD. If the Commission intends to establish a minimum number of hours of programming an MVPD must offer, however, that number should be set low enough to capture, for example, an MVPD that streams only a broadcast television station's prime time programming.

2. OVDs Cannot Be Invited to Circumvent the Retransmission Consent Regime by Declining MVPD Status

The *Notice* asks whether an OVD should be allowed to decide whether it wants to be

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[41] *See* S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) ("*[A]nyone engaged in retransmission by whatever means*" must obtain the consent of the broadcast television station whose signal is retransmitted (emphasis added)).

[42] Broadcast stations should, for example, be able to package their own primary and multicast programming streams for distribution online without triggering MVPD status. As the *Notice* observes, a contrary rule could subject a programmer "that decides to sell two or more of its own programming networks directly to consumers online, either instead of or in addition to selling them through cable or DBS operators' programming packages . . . to the benefits and burdens of MVPD status." *Notice* at ¶ 26.

classified as an MVPD. Clearly, any OVD that retransmits the signal of a television broadcast station should not be permitted to "opt out" of MVPD status and concurrent retransmission consent and other regulatory requirements when it is providing a video distribution service indistinguishable as a practical matter from those provided by traditional MVPDs. Such a rule would be administratively impractical to monitor and enforce, given the patchwork of regulated and unregulated online distributors throughout the country that would surely result.

II. An Interpretation of "MVPD" That Encompasses Broadcast-Streaming OVDs Is Essential to the Retransmission Consent Regime and the Important Public Interests It Serves

The *Notice* posits that a broad interpretation of the statutory term MVPD to encompass OVDs—one flexible enough to accommodate rapid evolution in the technologies used to transmit video programming—would further the pro-consumer, pro-competition goals of the Communications Act and the 1992 Cable Act.[43] The Affiliates Associations agree that reading the flexible, technology-neutral definition of "MVPD" to include OVDs (and refusing to read a "transmission path" requirement into that definition) would further the important policy goals of promoting competition and diversity and encouraging the development of new technologies for the delivery of video programming, all to the ultimate benefit of consumers. But the significance of MVPD status goes well beyond the promotion of competition, as the Commission has recognized previously: MVPD categorization "defines the entities subject to the retransmission

[43] *See Notice* at ¶ 23 (suggesting that the Linear Programming Interpretation proposed in the *Notice* "is most consistent with consumer expectations and industry trends" and that "Congress's goals are best served by an interpretation of MVPD that accommodates changing technology" (footnote omitted)).

consent requirement"[44] and thus bears significantly on the weighty public interests that underlie the congressionally-mandated retransmission consent regime.[45]

It follows from the Commission's correct Linear Programming Interpretation that broadcast-streaming OVDs, like traditional cable and satellite providers, are subject to the retransmission consent regime. Section 325(b)(1)(A) of the Act is unambiguous that "[n]o cable system or *other multichannel video programming distributor* shall retransmit the signal of a broadcasting station, or any part thereof, except with the express authority of the originating station."[46] Therefore, broadcast-streaming OVDs—just as all other categories of MVPDs—*must*

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[44] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Notice of Proposed Rulemaking, 7 FCC Rcd 8055, 8065 (1992), at ¶ 42.

[45] Indeed, in the 2012 proceeding, numerous commenters stressed the importance of applying the retransmission consent requirements to broadcast-streaming OVDs, regardless of whether those entities are considered MVPDs for other purposes. *See, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 12-83 (May 14, 2012) at 4 ("Broadcasters must continue to have the right to control the distribution of their signals over the Internet and to obtain compensation from broadband video service providers seeking to retransmit such signals."); Reply Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc., MB Docket No. 12-83 (June 13, 2012) at 7 (urging the Commission to "reinforce what Congress clearly intended when it adopted both the statutory license and retransmission consent regimes—that all distribution platforms must either obtain negotiated licenses from copyright owners or consent from broadcasters prior to retransmission the signals of broadcast stations," because "[o]nly if broadcasters maintain control over the retransmission of their signals can stations and broadcast networks continue to invest in the production and acquisition of the most popular news, sports, and entertainment content on television."); Reply Comments of CBS Corporation, MB Docket No. 12-83 (June 13, 2012) at 1-2 (arguing that exempting OVDs "from the rules governing MVPDs—most importantly, the requirement of obtaining a television broadcasters' consent before retransmitting its signal—would not only threaten to upend a carefully-crafted regulatory regime, but could materially affect a revenue stream important to television broadcasting."); Letter from John R. Feore, Jr. to Marlene H. Dortch, MB Docket No. 12-83 (June 13, 2012) at 2 ("Broadcasters' communications rights in their signals must be respected regardless of the transmission technology used by a video distributor.").

[46] 47 U.S.C. § 325(b)(1)(A) (emphasis added).

obtain a broadcast station's consent to retransmit all or any portion of a station's signal, just as the *Notice* recognizes.[47] That conclusion is inescapable in light of the emphatic legislative history that "broadcasters [must be allowed] to control the use of their signals by anyone engaged in retransmission *by whatever means*."[48]

MVPDs admitted in the 2012 proceeding that they desire a ruling that OVDs are not MVPDs in order to pave the way for their entry into the online video distribution market while avoiding the retransmission consent requirement and other regulatory burdens attendant to MVPD status.[49] That candid acknowledgement underscores the need for evenhanded regulation of *all* entities that distribute linear streams of video programming to subscribers, regardless of the *method* of transmission. Application of the retransmission consent regime only to facilities-based MVPDs would invite traditional MVPDs to migrate their services to the Internet.[50] Put

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[47] *See Notice* at ¶ 50 ("to the extent that an Internet-based distributor of video programming qualifies as an MVPD, it must receive the consent of the broadcaster before retransmitting the broadcaster's signal").

[48] S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1167 (1991) (emphasis added).

[49] *See, e.g.*, Comments of Time Warner Cable Inc., MB Docket No. 12-83 (May 14, 2012) at 2-3, 8-9; Comments of Verizon, MB Docket No. 12-83 (May 14, 2012) at 2, 13-15.

[50] In the *Sky Angel* proceeding, the Affiliates Associations, along with numerous other commenters, relied heavily on the importance of applying the retransmission consent requirements evenhandedly to broadcast-streaming OVDs to support a broad construction of the term MVPD. *See* 2012 Affiliates Associations Comments at 14-18. A contrary interpretation, they noted, would allow OVDs to retransmit a television broadcast signal without the consent of the station licensee—as Aereo and FilmOn X, among others, have attempted to do. Such a rule would invite programming distributors of all stripes, including incumbent MVPDs, to circumvent the retransmission consent requirement (and other MVPD regulatory obligations) simply by creating affiliated entities or entering into contractual relationships with third-party service providers to deliver (the same) "video programming" via an Internet connection. Commenters in the 2012 proceeding made precisely this point. *See, e.g.*, Comments of Public Knowledge, MB Docket No. 12-83 (May 14, 2012), at 16 (observing that, if OVDs are not (continued . . .)

differently, if broadcast-streaming OVDs are not subject to the retransmission consent requirements applicable to facilities-based MVPDs, then traditional MVPDs will do exactly what the *Notice* anticipates: They will begin distributing the same video programming to their existing subscribers via the Internet to avoid regulation as MVPDs. Such an asymmetrical, easily-circumvented regulatory regime would undermine and erode the public purposes served by the retransmission consent regime.

The retransmission consent requirement was manifestly intended to "establish the right of broadcast stations to control the use of their signals by cable systems and other [MVPDs]" in order to correct "a distortion in the video marketplace which *threaten[ed] the future of over-the-air broadcasting*."[51] The statutorily-conferred right to demand consent before their signals are retransmitted places in the hands of broadcasters the ability to control the resale of, and ensure fair compensation for, the use of their valuable property by others. That compensation in turn enables local stations to produce and provide the local news, public affairs, emergency, entertainment, and other programming that has long been recognized as the core of broadcast localism. As the Supreme Court noted in *Turner Broadcasting System, Inc. v. FCC*,

> the importance of local broadcasting outlets can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population"; similarly, "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First

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subject to the retransmission consent regime, "any MVPD would simply be able to spin off its facilities into a separate affiliate and then lease them back in order to avoid MVPD regulation").

[51] S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1168 (1991) (emphasis added).

Amendment.[52]

Retransmission consent is essential to the fulfillment of that purpose. The National Association of Broadcasters explained in 2012 that if broadcast-streaming OVDs are not subject to the retransmission consent requirement that applies to traditional MVPDs, local television stations will not "be able to continue making the substantial investments needed to offer high-quality, costly programming, including news, and to enhance their HD, multicast, and other current and future service offerings."[53]

Local television stations' continued ability to produce and distribute that programming lies at the core of the Commission's statutory localism mandate. Section 307 of the Communications Act directs the Commission to allocate broadcast licenses in local communities as it determines to be in the public interest, convenience, and necessity:

> (a) **Grant**. The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor, a station license provided for by this Act.
>
> (b) **Allocation of facilities**. In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. § 307)(a), (b). The Supreme Court in *Turner Broadcasting* noted that "Congress designed this system of [broadcast license] allocation to afford each community of appreciable

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[52] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (internal quotation marks and citations omitted).

[53] Comments of the National Association of Broadcasters, MB Docket No. 12-83 (May 14, 2012) at 4.

size an over-the-air source of information and an outlet for exchange on matters of local concern."[54] When it created the statutory licensing scheme embodied in the Communications Act, Congress could have designed, but chose not to, a system of *national*—rather than *local*—broadcasting. Instead, the 1934 Congress deliberately crafted a communications ecosystem predicated on *local* stations that serve their communities of license with programming of interest and value to *local* viewers, including *locally*-oriented news, weather, public affairs, emergency, and other programming. The broadcasting system created by the Communications Act gives communities from the largest metropolitan area to the smallest rural town an outlet for local self-expression. And perhaps most importantly, in times of emergency or natural disaster, local viewers look to their *local*—not distant—broadcast stations for news, updates, and public safety information.

Congress has long recognized that the public benefits from the national network/local affiliate station model. Strong national networks affiliated with strong local stations have provided the backbone of television news for decades. When considering legislation dealing with satellite distribution of local television signals in 1988, for example, the House Commerce Committee noted that, "[w]hile the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; *produces local news and other programs of special interest to its local audiences*; and creates an overall program schedule containing network, local and syndicated

[54] *Turner Broadcasting Sys.*, 512 U.S. at 663 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173-174 (1968)).

programming."[55]

Over time, a vigorous system for the distribution of local broadcast television signals has developed. MVPDs offer new means of delivery for local stations' signals, making valuable local content available to viewers by means of constantly developing technology. Those new technologies are, however, a supplement to, but not a replacement for, the local, over-the-air broadcast service that provides the foundation for the locally-oriented communications system envisioned by the Communications Act. The one-to-one architecture of MVPD services simply cannot replace the one-to-many architecture of over-the-air broadcasting in times of emergency. If MVPDs cannot, for technological reasons (such as the unavailability of the Internet during a natural disaster), make programming available to subscribers, local broadcast television stations remain the foundation for the distribution of essential, even life-saving, *local* programming. But that foundation will not exist at the time it is most urgently needed—and *no* local programming will be available for retransmission at all—if the business model on which over-the-air television broadcasting system is built is eroded. That system can continue to exist only if core principles of retransmission consent and program exclusivity are respected, because those principles safeguard the economic foundation of local broadcast stations' ability to provide local programming to their viewers: advertising revenues and retransmission consent fees. Any regulatory regime that treats OVDs as MVPDs therefore must acknowledge and incorporate those principles; without them, the entire business model on which the communications ecosystem built on locally-licensed broadcast stations is predicated will collapse.

In sum, with the proliferation of OVD services, including nascent services offered by

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[55] H.R. REP. NO. 100-887, pt. 2, *as reprinted in* 1988 U.S.C.C.A.N. 5577, 5648-49 (emphasis added).

traditional, facilities-based MVPDs, evenhanded application of the retransmission consent regime to OVDs is more essential than ever to ensure that the important public purposes underlying the retransmission consent requirement are not circumvented.

Moreover, as the Affiliates Associations pointed out in 2012,[56] failure to treat broadcast-streaming OVDs as MVPDs subject to retransmission consent rules would be inconsistent with the United States' obligations under numerous international free trade agreements, which require entities that distribute television signals over the Internet not only to obtain authorization from the copyright owners of the programming contained within the television signal but also to obtain retransmission consent from the rights holder of the signal itself. For example, the Dominican Republic-Central America-United States Free Trade Agreement states that

> no Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.[57]

Virtually identical language appears in the United States' free trade agreements with several other nations.[58] For this reason as well, the retransmission consent requirement must apply to *all*

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[56] *See* 2012 Affiliates Associations Reply Comments at 26-27.

[57] Dominican Republic-Central America-United States Free Trade Agreement, Art.15.5, § 10(b).

[58] *See, e.g.*, United States-Australia Free Trade Agreement, Art. 17.4, §10(b) ("neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal"); United States-Bahrain Free Trade Agreement, Art. 14.4, § 10(b) "neither Party shall permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal"); United States-Korea Free Trade Agreement, Art. 18.4, § 10(b) ("neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal"); United States-Morocco Free (continued . . .)

programming distributors regardless of the technology they employ.

III. Application of the Good Faith Negotiation Requirement to Broadcast-Streaming OVDs Should Be Guided by the Core Principles of Localism

The *Notice* seeks comment on "the policy ramifications of the various interpretations" it proposes.[59] A number of regulatory obligations attendant to MVPD status are of limited significance to broadcast stations and their contractual relationships with MVPDs that retransmit their signals. One such obligation, however, is of enormous consequence: the good faith negotiation requirement created for the retransmission consent regime. As explained above, the retransmission consent requirement is intended, in significant part, to foster the fundamental communications policy of broadcast localism.[60] That foundational principle should guide the Commission's implementation of the regulatory privileges and obligations that follow from, and

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Trade Agreement, Art. 15.5, § 11(b) ("neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal, if any, and of the signal"); United States-Panama Free Trade Agreement, Art. 15.5, § 10(b) ("neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal"); United States-Peru Trade Promotion Agreement, Art. 16.7, § 9 ("no Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal"). The Free Trade Agreements are available at http://www.ustr.gov/trade-agreements/free-trade-agreements.

[59] *Notice* at ¶ 33.

[60] *See* S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1168 (1991) (observing that the retransmission consent provisions "establish the right of broadcast stations to control the use of their signals by cable systems and other multichannel video programming distributors" in order to correct "a distortion in the video marketplace which *threatens the future of over-the-air broadcasting*" (emphasis added)); *id*. at 1169 (noting that "the intent of the [1992 Cable Act was] to ensure that our system of free broadcasting remain vibrant").

are directly related to, the retransmission consent requirement.

The most immediate—but by no means the exclusive—set of regulatory privileges and obligations related to retransmission consent is the Act's good faith negotiation requirements and the Commission's implementing regulations.[61] Once certain OVDs are classified as MVPDs, the good faith negotiation requirement will apply to both broadcasters and broadcast-streaming OVDs for carriage of broadcast signals by OVDs. The *Notice* suggests, however, that blind application of the existing requirements may not be in the public interest. The core principle of *localism* should guide the Commission's policy analysis in this respect.

For example, the *Notice* observes that strict application of the existing rules could force broadcasters to negotiate with thousands of OVDs[62] and, conversely, that OVDs that "operate on a nationwide basis [would] have to engage in negotiations with thousands of broadcasters throughout the nation."[63] Such a scale of potential negotiations is commercially unreasonable, both for broadcasters and OVDs. In addition, unlike traditional MVPDs, and certainly unlike traditional cable operators, satellite carriers, and telcos, OVDs could range from individuals with no means of accountability to distant entities. To create a fair playing field for all, to foster competition between existing facilities-based MVPDs and legitimate Linear Programming OVDs for the ultimate benefit of consumers, and to implement a regulatory regime that promotes and fosters broadcast *localism*, the Affiliates Associations propose the following framework for good

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[61] *See* 47 U.S.C. § 325(b)(3)(C)(ii)-(v); 47 C.F.R. § 76.65.

[62] *See Notice* at ¶ 44 (observing that the "rules could force broadcasters to negotiate with and license their signals to potentially large number of Internet-based distributors"); *id*. n.125 (citing Comcast Comments at 11-12 ("broadcasters potentially would face the prospect of having to negotiate . . . with thousands of OVDs")).

[63] *Notice* at ¶ 51.

faith negotiations between broadcasters and OVDs:

- **Registration Requirement.** While all OVDs seeking to retransmit a broadcast signal must obtain the express authorization of the originating station, those OVDs seeking to avail themselves of the good faith negotiation privileges should first be required to register with the Commission. The registration process, as in the case of cable television registration, need not be complex, but a Commission-sponsored registry will enable broadcasters to verify that an entity claiming to be an OVD has at least satisfied the threshold requirements for Commission registration, including a certification that the entity is what it says it is and an acknowledgment that it is subject to the Commission's rules, subject to penalty under federal law. For example, Section 76.1801 of the Commission's rules requires a cable system, before commencing operation, to file with the Commission a registration statement including, among other things, the system's legal name, mailing and email addresses, the date the system began service, the name of the community or area served, and the television broadcast signals it intends to carry.

Broadcasters should not have to negotiate with OVDs that are not registered.[64]

- **Notice of Intent to Commence Service.** An OVD seeking to avail itself of the good faith negotiation privileges should be required to provide at least 60 days' advance written notice by certified mail to all television stations in a local market of its intention to commence service of the retransmission of television broadcast signals. Similar requirements exist for cable systems and satellite carriers.[65]

- **Non-Discrimination Principle.** If an OVD *does not* intend to offer a service that

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[64] All broadcast stations are, of course, licensed by the Commission, and, thus, their *bona fides* are readily ascertained by OVDs (and other MVPDs, for that matter).

[65] *See* 47 C.F.R. § 76.64(k), § 76.66(d)(2)(i).

includes broadcast signals within a station's local market, then neither party should be required to negotiate with the other. To prevent discrimination (and to ensure compliance with the prohibition on exclusive contracts), neither party should be able to "cherry-pick" which other similarly-situated OVDs or broadcast stations, as the case may be, such a party would negotiate with, to the exclusion of others. Thus, for example, an OVD that claims to want to provide only nationwide service with no broadcast channels would not be required to negotiate for the right to deliver a broadcast television signal inside of a market, but if the OVD did decide to negotiate with any one such local station, it would be required to negotiate with all local stations in that market.

This application of a competitive marketplace consideration factor recognizes that entities that are not engaged in the same basic business should not be forced to needlessly negotiate with one another. If an OVD's business model is not predicated on retransmission of broadcast television stations in a television market, then the good faith negotiation requirement should not apply with respect to local stations in that market.[66] This factor alone will substantially reduce the number of potential negotiations broadcasters and OVDs might otherwise be subject to,[67] and it is supported by the Commission's precedent on the duty of broadcast stations and distant cable

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[66] For example, DISH Network's new OVD offering, Sling TV, does not currently include broadcast signals. Such non-broadcast services appeal to so-called "cord-cutters" who use an antenna to receive their local broadcast stations over the air and look to OVD services only as a supplement to broadcast programming. *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fifteenth Annual Report, 28 FCC Rcd 10496, 10500, 10592-93 (2013), at ¶¶ 8, 198 (estimating that "as of July 2012, there were . . . almost 11.1 million broadcast-only households, which represented 9.7 percent of all television households at that time").

[67] *See Notice* at ¶¶ 44, 51-52 (observing that the current good faith negotiation requirement, standing alone, could require thousands of negotiations for both broadcasters and OVDs and seeking comment).

operators to negotiate in good faith.[68] Perhaps most critically, this factor respects the principle of localism by only requiring full negotiations where local signals will be carried locally, thereby furthering the distribution of local news, emergency alerts, weather, and public affairs programming and fostering competition in the delivery of local content locally.

- **Authorization to Do Business.** If an OVD does intend to offer a service that includes local broadcast signals in a station's local market, then it should be required to be authorized to do business in those states in which it intends to retransmit a broadcast station's signal. As noted above, an OVD could be any type of individual or entity, even a teenager in another state, and the proposed threshold requirements are quite minimal. It is an appropriate competitive marketplace consideration for a broadcast station to truncate negotiations with an OVD that has not registered to do business in the states in which it is seeking to retransmit a broadcast station's signal and has not designated a local service agent.

- **OVD Assurances.** An OVD retransmitting a local television station's signal must be able to demonstrate that it has the means to

  * authenticate its subscribers to ensure that only those individuals authorized to receive a signal are, in fact, the only individuals actually receiving the signal;

  * geo-fence[69] the broadcast signal so that individuals located beyond the

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[68] *See, e.g., Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Reciprocal Bargaining Obligation*, Report and Order, 20 FCC Rcd 10339, 10354 (2005), at ¶ 32 ("At bottom, we do not believe that the reciprocal bargaining obligation should be used to engage distant entities and require protracted good faith negotiation for signals that have no logical or local relation to the MVPD's service area."); *see also ATC Broadband LLC and Dixie Cable TV, Inc. v. Gray Television Licensee, Inc.*, 24 FCC Rcd 1645, 1649 (2009), at ¶ 9.

[69] "Geo-fencing" refers to the technological ability to permit or limit access to programming in specific geographical areas. With respect to television stations, geo-fencing (continued . . .)

geographical area to which the broadcaster consents for retransmission cannot receive the signal;

* securely retransmit the signal and prevent unauthorized copying or further distribution of the signal;

* assure that it will retransmit the signal in its entirety, including, but not limited to, closed captioning, video description, ratings information, etc.; and

* assure that the quality of the signal is not materially degraded.

Each of the above functions is critical to a working model for online distribution of television broadcast signals. Companies have spent millions of dollars attempting to develop effective means to achieve each of these functions. If an OVD cannot demonstrate that it can ensure a broadcast signal will be retransmitted only to those individuals authorized to receive it, where they are authorized to receive it, and with adequate protections against copying, degradation of the signal, and further distribution, then that is a competitive marketplace consideration for the broadcaster to truncate and terminate further negotiations.

Recognition of these competitive marketplace considerations at the outset will enhance localism and foster the development of OVDs capable of offering a product containing local broadcast signals that can truly compete with incumbent MVPDs, all to the benefit of consumers.

IV. Program Exclusivity Must Be Applied to OVDs

The *Notice* states that even if OVDs are classified as MVPDs, an OVD "will not be subject to a number of regulations and statutory requirements applicable to cable and DBS

(. . . continued)
technology should permit access to programming in a station's DMA and/or outside the DMA where the station is significantly viewed—and would prevent access in other geographical areas. Such a limitation is essential to preserve broadcasters' program exclusivity rights (and may be *required* by their network affiliation agreements), while those rights, in turn, protect and promote core principles of broadcast localism, as further explained in Section IV.

operators unless it also qualifies as one of those services," including the network non-duplication rules.[70] However, the Commission should amend its network non-duplication and syndicated exclusivity rules in Sections 76.92 through 76.110 to apply to all non-satellite MVPDs.[71]

Program exclusivity is critical to the Nation's system of *local* broadcast service. Without exclusivity, broadcasters' ability to provide quality local programming is undermined. Both Congress and the Commission have long recognized that, "[i]n order for television programming to be produced, program producers and distributors must be compensated in such a way that they will have incentives to produce the amount and types of programming that viewers desire."[72] The Commission has also recently observed that, even today, on-air advertising revenues constitute about 85% of broadcasters' total revenues.[73] Thus, advertising revenues are the principal funding source for station investment in the creation and distribution of local programming. Naturally, advertisers expect exclusivity. As NAB has explained, "[i]f advertisers cannot be assured that their ads will reach local audiences without dilution or

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[70] *Notice* at ¶ 38 n.107 (citing 47 C.F.R. § 76.92 (applicable to cable operators) and 47 C.F.R. § 76.122 (applicable to satellite carriers).

[71] There are separate program exclusivity rules already applicable to satellite carriers, *see* 47 C.F.R. § 76.120 *et seq.*, but network non-duplication protection for local network affiliates is largely a function of the statutory structure of the satellite compulsory copyright license, which the Commission is without authority to change. *See* 17 U.S.C. § 119(a)(2)(B)(i) ("unserved household" restriction); 17 U.S.C. § 119(a)(3) ("if local, no distant" restrictions).

[72] *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, 5308 (1988), at ¶ 54; *see also* S. REP. NO. 92-102, 1992 U.S.C.C.A.N. 1133, 1168 (1991) (observing that the retransmission consent requirement was intended to correct "a distortion in the video marketplace which *threatens the future of over-the-air broadcasting*" (emphasis added)).

[73] *See Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3388 (2014), at ¶ 59.

diminution by virtue of the retransmission of competing (out-of-market) programming streams, local broadcasters likely will find it increasingly difficult to raise the capital necessary to produce and provide local programming."[74]

The Commission, accordingly, should amend its rules to make explicit that the program exclusivity rules apply to non-cable MVPDs, including broadcast-streaming OVDs. This result would protect and enhance the principle of localism and foster the continued investment in local programming, particularly news, weather, and emergency reporting.

The application of program exclusivity to broadcast-streaming OVDs is not precluded by the absence of a statutory compulsory copyright license applicable to online transmissions of programming.[75] Although the communications and copyright regimes are interconnected, the Commission's rationale for adopting program exclusivity protection for local broadcast stations predated the existence of a statutory compulsory copyright license for cable systems. In fact, the Commission adopted program exclusivity rules in 1966—a full decade before the cable compulsory copyright license was enacted by Congress in 1976. In its 1966 order applying carriage and non-duplication rules to all community antenna television systems, the Commission explained that its adoption of carriage and non-duplication rules "rested on two basic grounds: (1) that . . . duplication of their programs [i.e., the programs of local stations] [is an] unfair

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[74] Comments of NAB, MB Docket No. 10-71 (filed June 26, 2014), at 17. *See also Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Report and Order, 3 FCC Rcd 5299, 5308 (1988), at ¶ 50 (noting that, absent the syndex rules, "broadcasters and their viewers might well be particularly harmed by . . . reduced incentives to produce programming intended to be funded by advertiser support. Ultimately, and in a variety of ways, the television viewer, whose options are reduced, suffers as a result of the absence of exclusivity.").

[75] *See* Section V, *infra*.

competitive practice[] . . . and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential."[76] The 1966 Order in turn cited to the First Report and Order in two of the same dockets, in which the Commission had concluded that,

> [i]n light of the unequal footing on which broadcasters and [cable] systems now stand with respect to the market for program product, we cannot regard a [cable] system's duplication of local programming via signals of distant stations as a fair method of competition. . . . [T]he creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs.[77]

Nothing in those justifications for program exclusivity protection is dependent upon the existence of the Section 111 license, which was not enacted until several years later in the 1976 amendments to the Copyright Act.

V. Treating OVDs As MVPDs Does Not Entitle Those Entities to a Statutory Copyright License

The suggestion by some that a Commission determination that OVDs are MVPDs will conflict with the Copyright Act is incorrect.[78] The communications and copyright legal regimes

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[76] *See In the Matter of Amendment of Subpart I, Part 91, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, Second Report and Order, 2 F.C.C. 2d 725, 736 (1966), at ¶ 25.

[77] *Id*. at ¶ 27 (quoting *Amendment of Subpart L, Part 11 to Adopt Rules and Regulations to Govern the Grant of Authorization in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 F.C.C. 683 (1965), at ¶ 57).

[78] *See Notice* at ¶ 66 & n.189 (citing comments suggesting that "a Commission decision interpreting the definition of MVPD to include Internet-based distributors would conflict with copyright law").

are closely intertwined on these issues, but the Commission has clear authority, as demonstrated above, to classify OVDs as MVPDs as a matter of communications law policy, and that classification, alone, does not conflict with copyright law. Until the statutory copyright license is reinterpreted or amended, it simply means OVDs will need to negotiate for private copyright licenses, in addition to retransmission consent, if they desire to retransmit television broadcast signals over the Internet. Such discussions are already underway between many large MVPDs and broadcasters and their networks, both with respect to so-called TV Everywhere ("TVE") and over-the-top ("OTT") rights.

Where those discussions about TVE and OTT will end up is unknown at this point, but they illustrate the interrelated interests among local broadcast stations, broadcast networks, traditional MVPDs, and new OVDs/MVPDs. The *Notice* appropriately asks how the Commission should construe a broadcaster's obligation to negotiate in good faith if Congress or the courts do not afford a statutory copyright license to OVDs.[79] The Affiliates Associations respectfully suggest that a broadcast station should have the right to truncate and terminate negotiations if the station believes it does not have sufficient rights to offer a viable product. Retransmission of a broadcast station's signal raises novel and complicated rights issues, and the rights-cleared content within a station's signal may be far from complete. Television broadcast stations should not be required to negotiate further when the extent of the rights that the broadcast station can grant is insufficient and the retransmission of only portions of the signal does not make business sense.

The *Notice* also asks how network affiliation agreements impact local network affiliates'

[79] *See Notice* at ¶ 45.

rights to grant retransmission consent to OVDs.[80] Broadcast networks either own, or have obtained, the rights necessary to permit their affiliates to broadcast (publicly perform) the content in the network programming. Network affiliates may only sublicense the right to network programming to MVPDs (including OVDs) granted by their network and other content providers.[81] The broadcast networks and their local affiliates are partners in the network-affiliate model that has served the Nation so well for 70 years.

VI. Traditional Cable and Satellite Providers Cannot Avoid Regulation by Migrating Services to the Internet

The *Notice* seeks comment on "the regulatory treatment of national OTT video services that a cable operator or DBS provider may provide nationally—as contrasted to the traditional services it offers."[82] The Affiliates Associations agree that cable systems that use IP to deliver cable service should "continue to be subject to the pro-competitive, consumer-focused regulations that apply to cable even if they provide their services via IP"[83] while "video programming services that a cable operator may offer over the Internet should not be regulated as cable services."[84] They likewise agree with the *Notice*'s tentative conclusion that "[t]o the extent that DBS providers offer video programming services over the Internet . . . those services

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[80] *See Notice* at ¶ 53 & n.142.

[81] The same is true for all content licensed by local stations for which they do not own the copyrights themselves, such as syndicated content, music, news services, and sports clips, each of which is subject to the license terms of the copyright licensor.

[82] *Notice* at ¶ 71.

[83] *Notice* at ¶ 75; *see also id.* at ¶ 77.

[84] *Notice* at ¶ 78.

should not be regulated as DBS service, and therefore should not be subject to the regulatory and statutory obligations and privileges of such services" but nevertheless should be considered "MVPD services subject to the regulatory and statutory obligations of such services" according to the Commission's correct Linear Programming Interpretation.[85] In all events, the most critical consideration from the perspective of television broadcasters is that the rules not allow or invite cable or satellite providers to circumvent the retransmission consent regime by migrating their services to the Internet. Of course, if the Commission adopts the Linear Programming Interpretation, includes OVDs within the definition of MVPDs, and thus ensures that OTT services are equally subject to the retransmission consent requirements (subject to certain refinements of the good faith negotiation rules warranted by the OTT marketplace, as discussed in Section III), there will be no (retransmission-consent-related) incentive for traditional providers to attempt to avoid regulation by moving their services to Internet-based platforms.

Conclusion

For the foregoing reasons, the Affiliates Associations respectfully urge the Commission to adopt an interpretation of the term "multichannel video programming distributor" to encompass all entities that distribute linear video programming to subscribers, including those that distribute that programming via the Internet, and to subject all MVPDs, including broadcast-streaming OVDs, to the retransmission consent regime, the good faith negotiation requirement, and the program exclusivity rules as set forth herein.

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[85] *Notice* at ¶ 79.

Respectfully submitted,

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